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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 1018

IN THE MATTER
of
JOSEPH ROSEN, *et al.*, Individually and trading as Adam Hebeler & Co., Bankrupts,

SIMON L. FISCH, as Trustee in Bankruptcy of Joseph Rosen, *et al.*, Bankrupts,
Petitioner,

STANDARD FACTORS CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Simon L. Fisch, as Trustee in Bankruptcy of Joseph Rosen, *et al.*, individually and trading as Adam Hebeler & Co., Bankrupt, respectfully prays for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit, to review a decree of that Court entered on November 19, 1946, which affirmed an order of the United States District Court for the District of New Jersey, entered on June 13, 1946 (R. 104a, R. 84a).

The order of the District Judge reversed an order made by the Referee in Bankruptcy which adjudged that 44 assignments of accounts receivable constituted preferential transfers.

Opinions Below.

The opinion of the Circuit Court of Appeals for the Third Circuit is reported at 157 F. (2d) 997.

The opinion of the United States District Court for the District of New Jersey is reported at 66 F. Supp. 174.

The opinion of the Referee in Bankruptcy is not reported (R. 45a).

Jurisdictional Statement.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. A. Sec. 347) and Section 24(c) of the Bankruptcy Act (11 U. S. C. A. Section 47a).

Statutes Involved.

52 Stat. 840, 869, 11 U. S. C. A. Sec. 96 (1943).

> "SEC. 60. PREFERRED CREDITORS.—a. A preference is a transfer, as defined in this Act, of any of the property of a debtor to or for the benefit of a creditor for or on account of an antecedent debt, made or suffered by such debtor while insolvent and within four months before the filing by or against him of the petition in bankruptcy, or of the original

petition under chapter X, XI, XII, or XIII of this Act, the effect of which transfer will be to enable such creditor to obtain a greater percentage of his debt than some other creditor of the same class. For the purposes of subdivisions a and b of this section, a transfer shall be deemed to have been made at the time when it became so far perfected that no bona-fide purchaser from the debtor and no creditor could thereafter have acquired any rights in the property so transferred superior to the rights of the transferee therein, and, if such transfer is not so perfected prior to the filing of the petition in bankruptcy or of the original petition under chapter X, XI, XII, or XIII of this Act, it shall be deemed to have been made immediately before bankruptcy."

The Restatement, Contracts (1932) Sec. 173, is not a statute but it is here set forth for convenience of reference.

"SEC. 173 PRIORITIES BETWEEN SUCCESSIVE ASSIGNMENTS OF THE SAME RIGHT.

Where the obligee or an assignee makes two or more successive assignments of the same right, each of which would have been effective if it were the only assignment, the respective rights of the several assignees are determined by the following rules:

(a) A subsequent assignee acquires a right against the obligor to the exclusion of a prior assignee if the prior assignment is revocable or voidable by the assignor;

(b) Any assignee who purchases his assignment for value in good faith without notice of a prior assignment, and who obtains

(i) Payment or satisfaction of the obligor's duty, or

(ii) judgment against the obligor, or

(iii) a new contract with the obligor by means of a novation, or

(iv) delivery of a tangible token or writing, surrender of which is required by the obligor's contract for its enforcement,

can retain any performance so received and can enforce any judgment or novation so acquired, and, if he has obtained a token or writing as stated in subclause (iv), can enforce against the obligor the assigned right;

(c) Except as stated in Clauses (a) and (b), a prior assignee is entitled to the exclusion of a subsequent assignee to the assigned right and its proceeds."

Statement of the Matter Involved.

The bankrupts were engaged in the wholesale produce business at Newark, New Jersey and all their customers were located in New Jersey (R. 46a). Respondent is a New York corporation engaged in the factoring of accounts receivable and maintaining offices in New York City and Philadelphia, Pennsylvania.

By an instrument dated April 21, 1942, respondent agreed with the bankrupts to purchase their accounts receivable from time to time, and to pay up to 75% of the net amounts of invoices assigned. The bankrupts were authorized to collect and remit the proceeds of the assigned accounts (R. 45a).

Between April 22, 1942 and November 16, 1942 the bankrupts executed and delivered 45 separate assignments

of accounts receivable and respondent advanced 75% of the face amount on all but the last assignment (R. 46a).

On November 13, 1942 the attorney for the bankrupts advised respondent that the bankrupts' assets were less than their liabilities (R. 47a).

On November 16, 1942 the bankrupts executed and delivered their last assignment of accounts receivable in the face amount of $3,136.70 against which respondent advanced its check of $500 and then stopped payment on its check (R. 58a).

On November 18, 1942 respondent, for the first time, gave notice of its assignments to the customers of the bankrupt (R. 47a).

On November 23, 1942 the assignors were adjudged bankrupts (R. 47a).

On November 30, 1942, respondent filed a petition praying that it be adjudged that the Receiver (and Trustee) in Bankruptcy had no title or interest in and to the accounts receivable which were the subject of all 45 assignments and that the Receiver (and Trustee) be enjoined from interfering with its collection of the accounts (R. 6a).

The Receiver counterclaimed that under Section 60a and applicable state law the assignments constituted preferential transfers and that the last assignment dated November 16, 1942 was also void because of a total failure of consideration (R. 24a).

At the trial before the Referee, respondent waived, in open Court, any right or interest in and to the accounts which were the subject of the last assignment dated November 16, 1942 (R. 58a).

The Court below and the District Judge concurred in the findings of fact of the Referee that on November 16, 1942, and thereafter, the bankrupts were insolvent and that on November 16, 1942 respondent had actual knowledge of the insolvency (R. 74a).

The Referee in Bankruptcy adjudged that whether New Jersey was deemed to follow the English rule or the Massachusetts rule, now embodied in Restatement of Contracts, Section 173, (*supra*, p. 3), a subsequent *bona fide* purchaser for value could have acquired a superior right in the accounts receivable within the meaning of Section 60a of the Bankruptcy Act, and that the effective date of the assignments was therefore postponed by operation of Section 60a of the Bankruptcy Act until respondent first gave notice of its assignments to the customers of the bankrupts (R. 50a).

The District Judge and the Court below held that New Jersey did not follow the English rule and that a purchaser did not acquire a superior right under the Restatement of Contracts, Section 173 within the meaning of Section 60a of the Bankruptcy Act (R. 80a, 82a; R. 103a).

Questions Presented.

Are the four exceptions in the Restatement of Contracts, (1932) Section 173, "rights" in accounts receivable, as between bona fide successive assignees, within the meaning of Section 60 of the Bankruptcy Act?

Under Section 60 of the Bankruptcy Act is a transfer of accounts receivable deemed perfected as of the date of its delivery in a jurisdiction in which a subsequent bona

fide assignee could have collected the accounts receivable and held them free of the claim of the prior assignee?

Under Section 60 of the Bankruptcy Act is a transfer of accounts receivable deemed perfected as of the date of its delivery against a subsequent bona fide assignee in those jurisdictions which adopted, in toto, the opinion of this Court in *Salem Trust Co.*, v. *Manufacturers Finance Co.*, (1924) 264 U. S. 182; 68 L. Ed. 628; 31 A. L. R. 867?

Reasons Relied On for Granting the Writ.

1. The final decision in this cause is not limited to New Jersey but is applicable to many other jurisdictions.

2. The decision of the Court below is in conflict with a decision in the Eighth Circuit (*In re Vardaman Shoe Co.*, 52 F. Supp. 562 (E. D. Mo. 1943)).

3. The decision of the Court below is in conflict with the rationale of this Court's decision in *Corn Exchange Bank* v. *Klauder* (1943), 318 U. S. 434; 63 S. Ct. 679; 87 L. Ed. 884.

4. It is essential that Section 60a of the Bankruptcy Act be uniformly interpreted and applied throughout the United States.

ARGUMENT.

POINT I.

The final decision in this cause is not limited to New Jersey, but is applicable to many other jurisdictions.

In *Corn Exchange Bank* v. *Klauder, supra,* this Court granted certiorari because of a conflict in the interpretation and effect of Section 60 of the Bankruptcy Act as applied in those jurisdictions which follow the English rule of *Dearle* v. *Hall* (1828), 3 Russ. 1, 38 Engl. Rep. Full Reprint 475 (that a subsequent good faith assignee, first giving notice, acquired a superior right as against a prior good faith assignee).

This Court did not, however, rule upon the effect of Section 60 in those jurisdictions which adopted (in *toto*) the opinion of this Court in *Salem Trust Co.* v. *Manufacturers Finance Co., supra,* as embodied in the Restatement of Contracts, Section 173.

This Court held in *Corn Exchange Bank* v. *Klauder, supra,* that a transfer was deemed effective under Section 60a:

> "Only when such a (good faith) purchaser is precluded from obtaining superior rights. So long as the transaction is left open to possible intervening rights to such a purchaser, it is vulnerable to the intervening bankruptcy." (318 U. S. 435, 437).

And, held that in jurisdictions following *Dearle* v. *Hall,* the effective date of the transfers was accordingly postponed.

The English rule prevailed in many of the jurisdictions of this country. But, in 1924, this Court, in ***Salem Trust Co.* v. *Manufacturers Finance Co.*, rejected the English rule.**

The Restatement of Contracts thereupon rejected the English rule because, as Professor Williston predicted, many American courts would thereafter follow the *Salem Trust Co.* decision (Restatement, Contracts, Official Draft, published September 15, 1928, Appendix p. 276).

And see *State* v. *Stokke* (So. Dak. Sup. 1937), 272 N. W. 811; 110 A. L. R. 761.

The conclusion of the Third Circuit Court of Appeals in the instant case, that:

> "* * *, the favored position acquired by the subsequent assignee in the situations noted in Restatement, Contracts (1932), Sec. 173, comes not from his status as *bona fide* purchaser, but from his activities following his belated assignment." (R. 102a).

is therefore not limited in its application to New Jersey, but is applicable to all jurisdictions which adopted *Salem Trust Co.* v. *Manufacturers Finance* and the Restatement of Contracts, Sec. 173.

POINT II.

The decision of the Court below is in conflict with a decision in the Eighth Circuit.

The opinion of the Third Circuit is in direct conflict with an opinion in the Eighth Circuit. *In Re Vardaman Shoe Co.*, (D. C. E. D. Mo. 1943), 52 F. Supp. 562, 565, held

that Section 60 would postpone the effective date of a transfer in those jurisdictions which followed *Salem Trust* v. *Manufacturers Finance Co.*, and the Restatement of Contracts.

POINT III.

The decision of the Court below is in conflict with the rationale of this Court's decision in *Corn Exchange Bank* v. *Klauder*.

The Third Circuit's interpretation of Section 60 is in direct conflict with the opinion of this Court in the *Klauder* case. Nowhere in the *Klauder* case did this Court hold expressly or by implication that the subsequent assignee's "superior right" must arise simultaneously with the creation of his status as a subsequent *bona fide* purchaser. Yet that was the conclusion of the Court below.

On the contrary, this Court held that the "superior right" of the subsequent assignee would arise under the English rule when he gave notice—an activity which would necessarily occur after the creation of his status as a good faith purchaser. For the touchstone of this Court's decision was:

> "* * *, that because of the failure of these assignees to give notice to the debtors whose obligations were taken, a subsequent good faith assignee *giving such notice*, would acquire a right superior to theirs. (Italics ours.) (*Corn Exchange Bank* v. *Klauder*, 318 U. S. 434, 436.)

The point made by the Third Circuit that the subsequent assignee's favored position under the Restatement

"comes not from his status as a *bona fide* purchaser, but from his activities following his belated assignment" would therefore apply with equal force to a subsequent assignee who gave notice under the English rule to acquire a superior position.

As one commentator has noted:

> "The Supreme Court in Corn Exchange Bank *v.* Klauder * * * held that the transfer was to be considered as made only at the time when a *bona fide* purchaser who had taken action in addition to his purchase, could not have defeated it. In other words, the Surpeme Court not only imposed a hypothetical *bona fide* purchaser test but a hypothetical 'further action' test on the part of the purchaser." (Professor John Hanna in "The Business Lawyer, Vol. 1, No. 1, July 1946, A Bulletin of the Section on Corporation, Banking and Mercantile Law, American Bar Association").

POINT IV.

It is essential that Section 60a of the Bankruptcy Act be uniformly interpreted and applied throughout the United States.

This Court has heretofore stated:

> "What constitutes a transfer and when it is complete within the meaning of Section 60(a) of the Bankruptcy Act is necessarily a federal question, since it arises under a federal statute intended to have uniform application throughout the United States." *McKenzie* v. *Irving Trust Co.*, 323 U. S. 365, 369 (1945).

And this Court has heretofore noted that the business of factoring accounts receivable is of "large magnitude". (*Corn Exchange Bank* vs. *Klauder, supra,* 438).

It is of extreme importance that it be determined uniformly whether an assignment may be postponed in favor of a trustee in bankruptcy in those jurisdictions following *Salem Trust Co.* vs. *Manufacturers Finance Co.,* and the Restatement of Contracts.

Specification of Errors.

The Court below erred:

1. In failing to hold that in a jurisdiction which followed the Restatement of Contracts, Section 173, a subsequent assignee could as against a prior non-notifying assignee acquire a superior right within the meaning of Section 60a of the Bankruptcy Act.

2. In failing to hold that under applicable New Jersey law a prior non-notifying assignee cannot recover from a good faith assignee who has collected an account.

3. In failing to hold that the effective date of the assignments to Standard Factors Corporation was, by virtue of Section 60a of the Bankruptcy Act and applicable New Jersey law, postponed until notice of the assignments was first given to the customers of the bankrupts.

4. In failing to hold that the assignments of accounts receivable to Standard Factors Corporation constituted preferential transfers within the meaning of Section 60 of the Bankruptcy Act.

5. In failing to reverse the order dated June 13, 1946 entered by the District Judge in the United States District Court for the District of New Jersey.

6. In failing to affirm the order entered by the Referee in Bankruptcy, dated February 23, 1945.

7. In affirming the judgment dated June 13, 1946 entered by the District Judge in the United States District Court for the District of New Jersey.

Conclusion.

It is respectfully submitted that the petition for the writ of certiorari should be granted.

Dated, February 10th, 1947.

GEORGE FURST,
Attorney for Petitioner.